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A Comment on Erin McCampbell's Tipping the Scales: Seeking Death Through Comparative Value Arguments

Timothy J. Heaphy*

Erin McCampbell's Note, *Tipping the Scales: Seeking Death Through Comparative Value Arguments*,¹ brings insightful and important attention to a highly controversial subject in capital sentencing litigation. McCampbell asserts that such arguments persuade jurors but offend the Constitution. I disagree with both her assumption of the effectiveness of these arguments and her view of their constitutionality. "Comparative value" arguments do not violate a capital defendant's Eighth or Fourteenth Amendment rights, as they do not misstate the framework which the jury must apply to its ultimate sentencing determination. Moreover, a prosecutor's argument that a murder victim's life was somehow more valuable than the life of the man or woman responsible for his death runs the risk of offending individual jurors and flies in the face of both the adversarial process and the gatekeeping role of the court in guiding juror discretion.

I. What Is a Comparative Value Argument?

It is important to begin a discussion of this topic with some definition of what constitutes a comparative value argument. There are three distinct categories of arguments which fall within McCampbell's broad definition of comparative value. I believe each of these categories must be considered separately, as each category prompts a different result when held to Constitutional scrutiny.

The first category of comparative value argument is the type in which a prosecutor explicitly suggests to the jury that its sentencing discretion can and should be reduced to a simple mathematical formula. For instance, a

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1. Erin McCampbell, *Tipping the Scales: Seeking Death Through Comparative Value Arguments*, 63 WASH. & LEE L. REV. 379 (2006).

prosecutor might argue that because a victim's virtuous life was more valuable than a capital defendant's despicable life, the jury must impose the death penalty. An example of this kind of argument is found in *Hall v. Catoe*.² In that case, the prosecutor argued:

I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the [lives of the two girls were] worth, but nevertheless it is a question of values. What are the lives of these two girls worth? Are they worth the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps?³

The Supreme Court of South Carolina found that argument unconstitutional under the Eighth Amendment.⁴ The court specifically held that the prosecutor's argument "unquestionably directed the jurors to conduct an arbitrary balancing of worth, which required that Hall be sentenced to death if the jury found Hall's life was worth less than the lives of his victims."⁵ *Hall* demonstrates that a comparative value argument that misdirects jurors as to the legal standards that the law requires them to apply in arriving at their sentencing verdict is clearly unconstitutional. Any argument which suggests that capital sentencing is a contest of "comparative worth" rather than a reasoned balancing of specific, articulated factors will offend due process.

A second category of comparative value argument falls on the other, less objectionable end of the spectrum. A prosecutor might recite the virtues of the victim and the immoral character of the defendant without explicitly juxtaposing or linking the two. As the Supreme Court held in *Payne v. Tennessee*,⁶ victim impact evidence is admissible "to show . . . each victim's 'uniqueness as an individual human being.'"⁷ Similarly, the government may introduce evidence that bears upon a portrait of the defendant as a "uniquely individual human being[]." ⁸ This authority makes clear that in a capital sentencing hearing, the government may properly introduce evidence regarding the life, conduct, and character of both the victim and the defendant. A

2. *Hall v. Catoe*, 601 S.E.2d 335 (S.C. 2004).

3. *Id.* at 339.

4. *Id.* at 339–40.

5. *Id.* at 341.

6. *Payne v. Tennessee*, 501 U.S. 808 (1991).

7. *Id.* at 823 (citing *Booth v. Maryland*, 482 U.S. 496, 504 (1987)).

8. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (finding unconstitutional a statute that failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant").

summation in which the prosecutor restates established facts without comparing them is consequently proper.

The final category of comparative value argument falls somewhere between the above two categories. A prosecutor might explicitly juxtapose the life events, choices, or character of a murder victim with significant events, decisions, and qualities of the defendant, without asking the jury to compare them or arguing that the comparison between those individuals is the basis on which the jury should make its ultimate determination of sentence. A good example of this middle ground comparative value argument was at issue in *Humphries v. Ozmint*.⁹ The prosecutor in that case juxtaposed certain events in the life of the victim with specific bad acts of the defendant as follows:

[I]n 1984 [Dickie Smith] met Pat, and they fell in love, and they got married. That's the same year Shawn Paul Humphries committed two house break-ins at age 13. 1986—Dickie makes a pretty drastic move. He decides he's going to quit Kemet and go build homes full-time, and he goes out, and he starts building homes in the community he had grown up in. That's the same year Shawn Paul Humphries is up for his second probation violation and sent down to Columbia. Then in 1988, July the 4th, they have a little baby girl named Ashley. . . . That's the same year Shawn Paul Humphries went to jail for two years.¹⁰

Comparative value arguments such as the one at issue in *Humphries* invite a jury to compare the relative "worth" of the victim and the defendant. They stop short, however, of misstating the legal standard that jurors must apply to their sentencing determination. This "middle ground" third category of comparative value argument is perhaps more accurately called "comparative worth" argument. These worth juxtapositions are susceptible to different conclusions when held to constitutional scrutiny. Accordingly, I will focus my observations on this final category of comparative value arguments.

II. Comparative Worth Arguments Do Not Violate the Eighth Amendment

McC Campbell argues that the prosecutor's juxtaposition of the life of the murder victim and that of the defendant in *Humphries* violated the Eighth Amendment, as it misdirected the jurors as to their role in capital sentencing and the proper uses of victim impact and mitigation evidence.¹¹ Her argument

9. *Humphries v. Ozmint*, 397 F.3d 206 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 128 (2005).

10. *Id.* at 237.

11. McC Campbell, *supra* note 1, at 408–16.

must fail, as the prosecutor neither directly nor implicitly misstated the standards by which jurors must approach their sentencing determination.¹² The *Humphries* comparative worth argument relies strictly upon evidence properly admitted.¹³ It in no way suggests that jurors should evaluate victim impact or mitigation evidence for any improper purpose.¹⁴ Accordingly, this type of argument does not offend the Eighth Amendment.¹⁵

As McCampbell correctly points out, prosecutorial argument may violate the Eighth Amendment if it misdirects jurors as to their role.¹⁶ Interpreting *Caldwell v. Mississippi*,¹⁷ McCampbell correctly articulates the standard by which a comparative value argument would be evaluated under the Eighth Amendment:

To successfully challenge comparative value arguments under *Caldwell*, defendants must establish that (1) the law requires jurors to use a certain type of analysis in making their sentencing decision, and (2) that by making a comparative value argument, the prosecutor directed jurors to use a different analysis, and (3) that this misdirection on the law infected the trial with arbitrariness in violation of the Eighth Amendment.¹⁸

The prosecutor's argument in *Humphries* did not violate the *Caldwell* standard. By juxtaposing significant achievements in the life of the victim with mistakes, periods of incarceration, or other bad acts of the defendant, the prosecutor artfully summarized evidence properly before the jury.¹⁹ He did not take the forbidden step taken by the prosecutor in *Hall*, telling them that the jury's weighing of the relative worth of the victim and the defendant should be dispositive in their ultimate determination of punishment.²⁰ The comparative worth argument made in *Humphries* did not encourage the jury to ignore the requirement of finding the existence of a statutory aggravating factor beyond a reasonable doubt. Nor did this argument suggest to the jury that it should ignore validly introduced mitigation evidence. As it stayed faithful to the legal standard articulated by the judge's instructions to the jury for evaluation of the death penalty, the argument was proper.

12. *Humphries*, 397 F.3d at 223.

13. *Id.* at 219.

14. *Id.* at 223–24.

15. *Id.* at 225.

16. McCampbell, *supra* note 1, at 393–400.

17. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

18. McCampbell, *supra* note 1, at 404.

19. *Humphries v. Ozmint*, 397 F.3d 206, 211–15 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 128 (2005).

20. *Hall v. Catoe*, 601 S.E.2d 335, 339–40 (S.C. 2004).

McC Campbell suggests that comparative worth arguments encourage jurors to unduly credit victim impact evidence.²¹ That assertion has no merit. The prosecutor's argument in *Humphries* relied upon facts that establish the uniqueness of the victim,²² a category of evidence clearly recognized as relevant by the Supreme Court in *Payne*.²³ The prosecutor simply restated facts properly admitted in the sentencing hearing.²⁴ He did not misinform the jurors as to how they should consider that properly admitted victim impact evidence. His juxtaposition of properly admitted facts neither directly nor indirectly misdirected the jurors as to the standards they were required to apply to their sentencing decision. Accordingly, his argument did not run afoul of the Eighth Amendment.

McC Campbell also suggests that the juxtaposition of the victim and the defendant misdirects jurors as to the appropriate uses of mitigation evidence by encouraging jurors to ignore evidence that does not increase a defendant's "score" on the scale of moral value.²⁵ That assertion fails to recognize the persuasive force of evidence on the impact of mental deficiency, abuse and neglect, substance abuse, or other misfortune on a capital defendant. These facts do not make a defendant more "valuable." By contrast, they make the defendant less "valuable" on an objective scale of comparative worth. Such evidence nonetheless has a significant impact on a jury's consideration of that defendant's culpability and the propriety of the death penalty. Comparative worth arguments do not suggest to jurors that important aspects of mitigation are irrelevant. Indeed, they may even incorporate the details of a defendant's misfortune and acknowledge the mitigating impact of those facts.

Far from violating the Eighth Amendment, comparative worth arguments like those at issue in *Humphries* are consistent with the Supreme Court's Eighth Amendment analysis in *Payne*. One of the bases for the Court's explicit recognition of the relevance of victim impact evidence in *Payne* was the need to "balance" the broad category of mitigating information presented by a capital defendant. The Court specifically held:

The State has a legitimate interest in *counteracting* the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim

21. McC Campbell, *supra* note 1, at 408–11.

22. *Humphries*, 397 F.3d at 212–14.

23. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

24. *Humphries*, 397 F.3d at 220–21.

25. McC Campbell, *supra* note 1, at 411–14.

is an individual whose death represents a unique loss to society and in particular to his family.²⁶

The Court's use of the term "counteracting" explicitly invites comparison between two categories of evidence—information about the defendant's character and background brought forth by the defense, and information about the uniqueness of the victim, offered by the government. The first category is broad, as capital defendants are entitled to present almost anything that may bear upon mitigation. The Supreme Court has held that the Eighth Amendment prevents states from "limit[ing] the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty."²⁷ Applying this broad standard of admissibility, courts have imposed very little restriction on a defendant's ability to present mitigation evidence. In *Payne*, the Supreme Court recognized that the government has a legitimate interest in counteracting such mitigation with information about the victim. The Court's explicit recognition of that interest undercuts McCampbell's objection to comparative value arguments. The Court actually invites such argument, so long as it does not misstate the legal standards that govern the jury's ultimate sentencing decision.

The Supreme Court, in *Payne*, also recognized that a jury's consideration of victim impact evidence is consistent with community consensus as to the relevance of this information. Justice O'Connor framed the issue as follows:

"The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed cruel and unusual" . . . Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most states have enacted legislation enabling judges and juries to consider victim impact evidence.²⁸

Comparative value arguments are thus potentially violative of the Eighth Amendment if they are either "inherently cruel" or offensive to the "moral consensus of this society." The difference of opinion as to the propriety of these arguments reflected in the caselaw cited by McCampbell in this area demonstrates that they are not "cruel" *per se*. Consequently, they must be measured against community standards.

26. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (emphasis added).

27. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987).

28. *Payne*, 501 U.S. at 831 (O'Connor, J., concurring) (citation omitted).

The "moral consensus of this society" standard is flatly inconsistent with McCampbell's objection to comparative value arguments. The relevance of victim impact testimony is reflected in a consistent pattern of legislation. States have explicitly allowed jurors to consider such evidence in capital sentencing proceedings, which reflects popular belief that victims' interests are relevant and should be considered.²⁹ This "moral consensus" significantly handicaps McCampbell's claim that comparative value arguments violate the Eighth Amendment.³⁰

III. Practical Considerations Minimize the Potential Damage (and Effectiveness) of Comparative Worth Arguments

McCampbell's objection to comparative worth arguments rests upon the assumption that such arguments are powerfully persuasive. In support of that proposition, she cites anecdotal evidence such as an observation by the trial judge in *Humphries* that the prosecutor's argument in that case was "one of the best arguments . . . in terms of effectiveness."³¹ While arguments such as the one at issue in the *Humphries* case can be effective, they are not, in my view, universally persuasive.

29. E.g., FLA. STAT. ANN. § 921.141(7) (West Supp. 2006); N.J. STAT. ANN. § 2C:11-3(c)(6) (West 2005); OKLA. STAT. ANN. tit. 22, § 984.1 (West Supp. 2004). Congress recently enacted the Justice for All Act of 2004, Pub. L. No. 108-405, § 1(a), 118 Stat. 2260 (creating provisions relating to crime victims' rights codified at 18 U.S.C.A. § 3771), a statute which extends the rights of victims in federal criminal cases. 18 U.S.C.A. § 3771(a) (West Supp. 2005). The new law mandates, in part, that victims be provided the right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." *Id.* § 3771(a)(4). The Justice for All Act reflects congressional concurrence with the near consistent state authority recognizing the interests of victims in all criminal proceedings.

30. McCampbell argues that comparative value arguments offend the Due Process Clause of the Fourteenth Amendment for the same reasons that such arguments violate the Eighth Amendment. As discussed above in Part I, I believe that these arguments do not violate the Eighth Amendment unless they misstate the standard for juror consideration of the death penalty. McCampbell additionally suggests that such arguments are violative of the Fourteenth Amendment because they are inflammatory. McCampbell, *supra* note 1, at 417-19. She goes on to recite the dangers of juror consideration of victim impact evidence—an argument that was rejected by the Supreme Court in *Payne*. *Payne*, 501 U.S. at 827. A prosecutor's recitation of properly admitted victim impact evidence without contradiction of the standards by which that evidence must be considered by the jury may be persuasive to jurors. It is not, however, unconstitutionally inflammatory. Because these middle ground "comparative worth" arguments include evidence which the Supreme Court has recognized as legitimate, they do not violate due process.

31. *Humphries v. Ozmint*, 397 F.3d 206, 246 (4th Cir. 2005) (Wilkinson, J., dissenting), *cert. denied*, 126 S. Ct. 128 (2005).

The prosecuting authority assumes an extremely heavy burden in any attempt to persuade a jury to impose the death penalty upon a criminal defendant. The prosecutor must convince each of twelve individual jurors that the defendant's acts merit his execution. If even one juror is unable to conclude that the punishment is warranted, the penalty cannot be imposed. The fact that a "mistake" in capital sentencing is irreversible inevitably makes jurors cautious. Their caution elevates the prosecutor's burden.

The jury's sentencing decision is collective, yet extremely personal. The trial judge may specifically instruct jurors that their decision as to the punishment should be each juror's and his alone. Courts may go so far as to tell deliberating jurors that they "must not surrender [their] honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict."³² While jurors must consider each other's view and deliberate to reach a decision, each juror must make a very personal determination as to whether the defendant should be put to death.³³ Juror "deliberation" in a capital sentencing hearing is fundamentally different from that which operates in a guilt or innocence finding, as reflected by the court's jury instructions.

The combination of the magnitude of the jury's verdict and the individual nature of each juror's decision creates a real risk that a comparative worth argument will explicitly or implicitly offend an individual juror. If a prosecutor tells the jury that a defendant is less valuable than a victim and is consequently less "worthy" of life, he is criticizing the defendant's character rather than his conduct. That kind of characterization of a defendant may contradict an individual juror's personal belief in that defendant's character. Moreover, individual jurors may believe that the prosecutor's characterization is based on improper factors such as race, gender, or socio-economic status. For example, if the victim was Caucasian and the defendant is African-American, jurors may believe that the prosecutor is devaluing the defendant at least in part because of

32. ABA STANDARDS FOR CRIMINAL JUSTICE § 15-4.4(a) cmt. (2d ed. 1982) (quoting Instruction 8.11 of *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98 (1961)).

33. See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231, 237-40 (1988) (affirming a supplemental instruction to the jury members to consider the thoughts and reasoning of their fellow jury members while reaching their own decision as to guilt); *Allen v. United States*, 164 U.S. 492, 501-02 (1896) (same); *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993) (holding that there is no claim of coercion as a result of a jury instruction stating that in the event of a hung jury, jurors should change their minds only if they become convinced that they are wrong and not because they feel differently than others); *United States v. Smith*, 857 F.2d 682, 684 (10th Cir. 1988) (finding no error in a jury instruction telling jurors to examine their beliefs in light of the beliefs of the others, but to only make their final decision upon their own beliefs).

his race—an offensive and irrelevant factor. As determinations of value and worth are extremely subjective, a prosecutor journeys down the path of categorization at his peril.

McCampbell's objection to comparative value arguments also ignores the important roles played by the judge and defense counsel in capital sentencing hearings. All of the evidence and argument put forth by the government is tested and rebutted by counsel for the capital defendant. Defense counsel has the opportunity to challenge the evidence put forth by the government through cross-examination. The defense may also present valuable mitigation information. Of course, counsel will present argument as to how jurors should view all of the evidence and suggest to them that the totality of the evidence justifies a sentence other than death.

The court is even more directly involved in guiding the jury's exercise of discretion. The court controls what sorts of evidence will be presented to the jury. With respect to victim impact evidence, judges often restrict both the quality and quantity of evidence presented by the government. The judge may limit the number of witnesses who develop the "uniqueness" of the victim. The court may also carefully confine the subject matter of the victim impact witnesses to the two permissible purposes articulated in *Payne*.³⁴ Most significantly, the court must instruct the jury as to the methodical process by which it must make its sentencing determination. Those instructions will make clear that the sentencing determination should be based on a weighing of various aggravating and mitigating factors, rather than a mathematical calculation of comparative value.

McCampbell's argument about the persuasiveness of comparative value arguments fails to account for the adversarial nature of the sentencing hearing and the court's definition of the standards which govern jury discretion. Her position suggests that the government has undue influence in the process. It ignores the defendant's right to challenge the evidence and counter the arguments of the prosecutor. It implies that jurors will be dangerously misled into disregarding or misapplying the careful instructions of the trial judge. She overestimates the impact of prosecutorial argument in general and fails to plug that argument into the larger context of a capital sentencing hearing.

McCampbell's objection to the use of comparative value arguments also rests upon a mistaken impression of the impact of prosecutorial argument on sentencing jurors. In my experience trying cases, I have become increasingly

34. See *Payne v. Tennessee*, 501 U.S. 808, 825–27 (1991) (holding that victim impact evidence may be used to assist the jury in determining the moral blameworthiness of the defendant and to assist the jury in its decision whether or not to impose the death penalty).

convinced that jurors are more affected by evidence than by argument. While the rhetoric of attorneys on both sides can help jurors understand the evidence and move them toward a decision, the facts themselves have a much more profound impact on jurors and are more responsible for their verdicts. Jurors are able to evaluate facts and apply standards of law. Even in the face of the tension and pressure of a capital sentencing hearing, jurors consistently abide by their oath and base their decision on facts and law. McCampbell's paper reflects a patronizing view of jurors, as it assumes that they are easily misled by a lawyer's rhetoric. My experience is directly contrary to that assumption. Jurors generally do as they are instructed, basing their decisions on the facts they find and the law as given by the judge.

Tipping the Scales does a good job of highlighting an emerging and contentious trend in capital litigation. However, it fails to offer a persuasive argument that the middle ground comparative worth arguments described above offend the Constitutional rights of capital defendants. The Note also ignores important components of the methodical capital litigation process. Accordingly, *Tipping the Scales* fails to answer the important questions it insightfully identifies.